

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JAMES PETTUS,

Plaintiff,

v.

9:06-CV-152

**C.O. BROWN; LIEUTENANT McGEEVER;
SUPT. CORCORAN; and SUPT. McGINNIS,**

Defendants.

APPEARANCES:

JAMES PETTUS
Plaintiff *Pro Se*

HON. ANDREW M. CUOMO, New York State Attorney General
BRUCE J. BOIVIN, ESQ., Assistant Attorney General
The Capitol
Albany, New York 12224
Attorney for Defendants

Hon. Norman A. Mordue, Chief U.S. District Judge

MEMORANDUM-DECISION AND ORDER

Plaintiff, an inmate in the custody of the New York State Department of Correctional Services ("DOCS"), brought this action under 42 U.S.C. § 1983. In his complaint, (Dkt. No. 1), filed February 3, 2006, plaintiff alleges that defendants, DOCS employees, violated his constitutional rights under the First, Fourth, Eighth, and Fourteenth Amendments.

Plaintiff moves (Dkt. No. 16) to compel discovery. Defendants cross-move (Dkt. No. 18) to dismiss the complaint. Upon referral pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c), United States Magistrate Judge David R. Homer issued a Report and Recommendation (Dkt. No. 24) in which he recommends that defendants' cross motion to dismiss be granted

conditionally and that plaintiff's motion to compel be denied without prejudice.

Plaintiff has submitted an objection (Dkt. No. 25). In view of plaintiff's objection, pursuant to 28 U.S.C. § 636(b)(1)(C), this Court conducts a *de novo* review. Defendants' motion to dismiss is based on 28 U.S.C. § 1915(g), which provides in full:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

As United States Magistrate Judge David E. Peebles has observed, the "imminent danger of serious injury" exception is "a safety valve, obviously intended to protect a prison inmate exposed to potential danger from the harsh consequences of his or her earlier folly[.]" *Williams v. Goord*, 2007 WL 952053, *5 (N.D.N.Y., Report and Recommendation adopted by U.S. District Judge Lawrence E. Kahn). The exception in section 1915(g) requires "a showing that the prisoner was under ... imminent danger at the time of filing[.]" *Malik v. McGinnis*, 293 F.3d 559, 562-63 (2d Cir. 2002).

Even when afforded the most liberal reading, plaintiff's objection, medical records and other papers fail to suggest any imminent danger of serious physical injury at the time of the filing of the complaint within the meaning of 28 U.S.C. § 1915(g). Upon *de novo* review of the file, including plaintiff's objection, the Court approves and adopts the Report and Recommendation in its entirety.

Accordingly, it is

ORDERED that the Report and Recommendation of United States Magistrate Judge David R. Homer (Dkt. No. 24) is approved and adopted; and it is further

ORDERED that the motion by defendants (Dkt. No. 18) is granted; and it is further

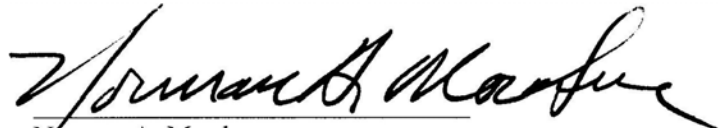
ORDERED that the complaint is dismissed as to all defendants and all claims unless plaintiff pays the full filing fee of \$250 within 30 days after the entry of this Order; and it is further

ORDERED that the motion by plaintiff (Dkt. No. 16) is denied without prejudice to renewal in the event that the required filing fee is paid within 30 days of the date of this Memorandum-Decision and Order; and it is further

ORDERED that the Order granting plaintiff *in forma pauperis* status (Dkt. No. 5) is vacated.

IT IS SO ORDERED.

June 19, 2007
Syracuse, New York



Norman A. Mordue
Chief United States District Court Judge